SUPREME COURT, U.S.
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No. 94-617

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1993

JANET LIERENZ,
Petitioner,

vs.

MAX BOWEN,
REGAN L. LUTZKO,
ROBERT J. HILL,
Respondents

On Petition For A Writ Of Certiorari To The Erie County Court of Appeals of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondents Max Bowen, Regan L. Lutzko, and Robert J. Hill respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the decision of The Erie County Court of Appeals of Ohio, 6th Appellate District, in this case.

OPINIONS

The opinion of The Court of Appeals for Erie County, Ohio, 6th Appellate District is unreported and appears in Petitioner's Appendix A.

SUMMARY OF ARGUMENT

Petitioner seeks review of the decision of The Court of Appeals of Erie County, Ohio, 6th Appellate District, reversing the Trial Court's denial of a motion to Dismiss Petitioners Complaint. Petitioner asserts two issues for review:

I. That The Ohio Appellate Court's Dismissal of Petitioner's Complaint is a violation of the Due Process Clause of the 5th and 14th amendment; and

II. That its decision violates Petitioner's right to Trial by Jury.

With respect to Petitioner's first claim she contends that she was denied due process because the Appeals Court dismissed her Complaint. The uncontroverted facts show she had filed a final accounting with The Probate Court of Huron County on August 13, 1990 with the assistance of council. She was given notice of the Hearing on the final accounting, which was set for Hearing September 28, 1990 and at which The Probate Court of Huron County approved her final accounting and discharged her from her capacity as a fiduciary. That discharge, pursuant to R.C. 2109.35 had "the affect of a Judgment." Petitioner had 172 days before Trial to Move The Probate Court of Huron County to vacate its Judgment of September 28, 1990. She, at no time, from the filing of the Motion asking The Common Pleas Court of Erie County to dismiss her Complaint because of her lack of fiduciary capacity up until and through the Trial, which commenced on July 6, 1992, applied to The Huron County Probate Court to be reappointed as fiduciary assuming she could comply with one of the grounds to vacate the Court's settlement of the fiduciary's account and its affect as a Judgment pursuant to R.C. 2109.35.

Petitioner's second claim of denial of the right to Trial by Jury in light of the fact that she had no representative capacity at the time that this matter came on for Trial did not violate Petitioner's

right to Trial by Jury since she has no representative capacity in this matter.

STATEMENT OF THE CASE

Petitioner, in her sole capacity as Executor of The Estate of her late husband filed a lawsuit against Respondents d/b/a Crown Motel. Respondents d/b/a Crown Motel filed Counter-Claims.

While the Complaint was pending, Petitioner's Probate Attorney filed a fiduciary's account in The Probate Court of Huron County. That account had the following statement checked as to the nature of the fiduciary's final account it provided as follows: "This is a final and distributive account, and the fiduciary asks to be discharged from her Trust upon its approval and settlement." It is to be noted that the form which was provided by The Probate Court of Huron County could have been checked by the Petitioner with any one of the following applicable sentences:

1. This is a partial account. A statement of the assets remaining in the fiduciary's hands is attached.

2. This is a final account. A statement of the assets remaining in the fiduciary's hands for distribution to the beneficiaries is attached.

3. This is a distributive account, and the fiduciary asks to be discharged from her Trust upon its approval and settlement.

Petitioner in her receipts and disbursements showed the following:

Crown Motel, Route 250 N., Milan, Ohio value of amount collected 0 value or amount $30,000.

Petitioner was notified of a Hearing September 28, 1990 at 10:00 a.m. concerning her application to approve the final and distributive account and asking to be discharged from her Trust. The Huron County Probate Court on September 28, 1990 entered the following Judgment Entry:

> The estate has been fully administered and the assets have been distributed in accordance with law and the applicable instruments governing distribution;
>
> The events have occurred after which the Court may approve and settle a final account. The account is therefore approved and settled.
>
> The fiduciary is discharged from his Trust.

In January, 1992 Respondents filed a Motion to dismiss Petitioner's Complaint on the ground that she lacked authority to maintain her lawsuit. The Trial Court denied Respondents Motion. A Trial commenced July 6, 1990, and resulted in a verdict against Respondents on July 8. Petitioner, October 8, 1992, eight and a half months after Respondents had filed their Motion placing Petitioner on Notice that they contested her representative capacity, and three months after the verdict, filed a Motion in The Probate Court of Huron County to reappoint Petitioner in her representative capacity. Petitioner failed to notify Respondents concerning her Motion to be reappointed pursuant to R.C. 2109.35(D). Respondents timely filed an Appeal to The Erie County, Ohio Court of Appeals, 6th Appellate District, on the sole assignment of error that the Trial Court erred in over-ruling their Motion to Dismiss Petitioner's Complaint. The Ohio Appellate Court found that the denial of Respondents Motion to Dismiss was contrary to law and Respondents sole assignment of error was found well taken. In essence, the Appellate Court found that The Trial Court should

have granted Respondents Motion to Dismiss.

Petitioner then filed a Memorandum in Support of Jurisdiction to The Ohio Supreme Court alleging violation of her right to due process and her right to Trial by Jury. The Ohio Supreme Court refused Petitioner's request to accept jurisdiction.

REASONS FOR DENYING THE PETITION

Petitioner asserts that The Erie County Court of Appeals of Ohio deprived Petitioner of her chose in action when it dismissed her case, without any notice that her case was subject to dismissal.

I. THE COURT OF APPEALS ACTED IN ACCORDANCE WITH APPLICABLE LAW ON RESPONDENTS MOTION TO DISMISS.

A. Petitioner voluntarily, knowingly and intelligently waived her chose in action.

Where Petitioner voluntarily, knowingly, and intelligently waived a known property right to sue in her representative capacity it is not a denial of a person's right to due process under the 5th and 14th amendments of The U.S. Constitution, or The Ohio Constitution if a Court subsequently dismisses her Complaint after she has voluntarily, knowingly, and intelligently waived her property right.

Appellant contends that she was denied due process because The Appeals Court dismissed her Complaint. Petitioner filed the final accounting with The Probate Court of Huron County on August 13, 1990 with the assistance of counsel. She was given notice of the Hearing of the final accounting which was set for September 28, 1990, and at which The Probate Court of Huron

County approved her final accounting and discharged her from her capacity as a fiduciary, and that discharge pursuant to R.C. 2109.35 had "the affect of a judgment."

Of course, the right to notice and an opportunity to substitute the new party in interest may be waived by a person as long as it is done knowingly, voluntarily, and intelligently, *Overmeyer vs Frick Co.* 405 U.S. 174, 31L. Ed.2d 92, S.Ct.775, 61 O.Ops.2d 528 (1972). Respondent fails to see how under these set of circumstances Petitioner's right to notice and a Hearing was in any way violated pursuant to The Due Process Clause of the 5th and 14th amendment to The U.S. Constitution or The Ohio Constitution. Petitioner filed her final accounting and asked to be discharged as the fiduciary. The Court scheduled a hearing September 28, 1990 and did exactly what she asked the Court to do. Respondents fail to see any constitutional violations.

B. The Ohio Appellate Court properly interpreted R.C. 2109.35.

Ohio Revised Code Section 2109.35 provides in pertinent part as follows:

> The order of the Probate Court upon the settlement of a fiduciary's account shall have the affect of a Judgment.

The Ohio Statute sets forth only four exceptions under which such an Order may be vacated:

> A. . . .for fraud. . . .,
>
> B. . . .for good cause shown other than fraud, upon Motion of any person affected by the Order who was not a Party to the proceeding in which the Order was made. . . .and who had no knowledge of the proceeding in time to appear in it;
>
> C. . . .for good cause shown, other than fraud, upon Motion of any person affected by the Order who was a Party to the proceeding in which the Order was made solely by reason

of his having been served by publication . . . .,

D. . . .for good cause shown upon Motion of the fiduciary, if the Motion if filed prior to the settlement of the account showing that the fiduciary has fully discharged his trust. . . .

Petitioner could not show any basis for vacating her discharge as fiduciary pursuant to the four exceptions delineated in A thru D above. The Ohio Appellate Court correctly dismissed Petitioner's Complaint because the estate was closed and the Petitioner discharged at the time the Trial commenced. Petitioner could not show any exceptions to the affect of The Huron County Probate Court's Order of September 28, 1991, therefore, Respondents Motion for Dismissal should have been granted by the Trial Court. The Ohio Appellate Court corrected this obvious error by the Trial Court by granting Respondents Motion for Dismissal. The Appellate Court's Ruling comports with the plain language of The Ohio statute and prior Ohio case law, *In Re: Reithler,* (1956), 73 Ohio Law Abs. 328, 137 N.E. 2d. 791.

C. Ohio Revised Code Section 2109.35 is Constitutional.

Petitioner, in essence, is attacking the constitutionality of Ohio Revised Code Section 2109.35. Petitioner believes she is entitled to a cause of action, even though she knowingly, intelligently and voluntarily closed the estate and discharged herself as fiduciary with the knowledge that there was an existing claim. It is not the Ohio procedural statute which is flawed here, but the Petitioner's own voluntary act. Petitioner received all the process that was constitutionally required. No single model of procedural fairness is dictated by the Due Process Clause, *Kramer vs Chemical Construction Corp.* 456 U.S. 461, 72 L Ed 2d. 262, 102 S Ct 1883(1982); *Mitchell vs W.T. Grant.* 416 U.S. 600, 40L Ed 2d. 406, 94S Ct 1895(1974); *Inland Empire Counsel vs Millis,* 325 U.S. 697, 89 L Ed 1877,

65 S Ct. 1316 (1945).

II. THIS CASE PRESENTS NO QUESTION OF PETITIONER'S RIGHT TO A TRIAL BY JURY.

A. Petitioner voluntarily, knowingly, and intelligently waived her right to Trial by Jury.

When Petitioner asked the Court to approver her final and distributive account, and to be discharged from her Trust with the assistance of counsel, she waived whatever right she had at that time concerning her claim against Respondent's for Trial by Jury. It can only be assumed that Petitioner, who was represented by counsel understood the significance of being discharged as a executor of the estate.

B. Petitioner's discharge as fiduciary for the estate of Plaintiff is not a pleading defect.

Plaintiff contends that the case at bar is a mere pleading defect. The language of R.C. 2109.35 is plain on its face and does not violate either the U.S. or Ohio constitutions concerning the right to Trial by Jury.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

/S/ John F. Kirwan

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CERTIFICATION

I hereby certify a copy of the foregoing Respondent's Brief In Opposition has been served by ordinary U.S. Mail to Peggy Honig, Co-Counsel for Petitioner, 458 Leader Building, Cleveland, Ohio 44114 and to J. Michael Goldberg, Counsel for Petitioner, 75 Public Square, Suite 1020, Cleveland, Ohio 44113 this day of November, 1994.

/S/ John F. Kirwan

John F. Kirwan
Attorney for Respondents